

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3

4 UNITED STATES OF AMERICA,) CRIMINAL NO. 17-00582JMS-RLP

5 Plaintiff,) Honolulu, Hawaii

6 vs.) May 3, 2019

7 KATHERINE P. KEALOHA (1),) FINAL PRETRIAL CONFERENCE

8 aka Katherine E. Kealoha,)

9 aka Kathy Kealoha,)

10 aka Kat, aka Alison Lee Wong,)

11 LOUIS M. KEALOHA (2),)

12 DEREK WAYNE HAHN (3),)

 MINH-HUNG NGUYEN (4),)

 aka Bobby Nguyen,)

 GORDON SHIRAISHI (5),)

 Defendants.)

APPEARANCES:

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1 APPEARANCES (Cont'd.):

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20 Official Court Cynthia Fazio, RMR, CRR, CRC
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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 FRIDAY, MAY 3, 2019 2:19 P.M.

2 THE COURTROOM MANAGER: Criminal Number
3 17-00582JMS-RLP, United States of America versus Katherine P.
4 Kealoha, et al.

5 This case has been called for a final pretrial
6 conference.

7 Counsel, please make your appearance for the record.

8 MR. McDONALD: Good afternoon, Your Honor. Colin
9 McDonald, Janaki Gandhi and Joseph Orabona on behalf of the
10 United States. And thank you for allowing us to appear by
11 telephone today.

12 THE COURT: All right. Yes, thank you.

13 MS. KAGIWADA: Good afternoon, Your Honor. Cynthia
14 Kagiwada on behalf of Katherine Kealoha. I would request that
15 my client's presence be waived.

16 THE COURT: Yes.

17 MR. BARBEE: Good afternoon, Your Honor. Rustam
18 Barbee appearing on behalf of Louis Kealoha. I'd ask that his
19 presence be waived also.

20 THE COURT: Yes.

21 MR. BERVAR: Good afternoon, Your Honor. Birney
22 Bervar on behalf of defendant number three, Derek Hahn. I'd
23 like to waive his presence.

24 THE COURT: Yes.

25 MR. HIRONAKA: Your Honor, good afternoon. Randy

1 Hironaka on behalf of Bobby Nguyen, whose presence I would ask
2 the Court to waive.

3 THE COURT: Yes.

4 MR. ISAACSON: Good afternoon, Your Honor. Lars
5 Isaacson for Mr. Shiraishi. I'd ask his presence be waived.

6 THE COURT: Yes. Thank you. All right. Good
7 afternoon, everyone. You may be seated. You can stay seated
8 if you want, just speak into the microphone.

9 All right. So I think that, you know, Ms. Kagiwada
10 suggested we get back together one time. Let me give you an
11 update as to where we are with the jury pool. We can start
12 with that. We sent out 1500 questionnaires. I don't have the
13 exact number of no responses, but out of that there's always a
14 large number of people who don't respond. We got 453 timely
15 "yes," that is able to serve. And that is either people who
16 said "yes" or after I looked through it I determined they
17 should be included in the "yes" pile. Okay.

18 And I went through all of the no's, agreed they can't
19 serve for a multitude of reasons, the biggest being travel.
20 With summer coming up, a lot of people have travel plans and
21 submitted, you know, their purchased plane tickets and so
22 forth.

23 Then after we sent out the summons to appear on the
24 13th, of the 453, we received 30 -- of those 30 no's. In other
25 words, oh, I checked the wrong box, or some of them have real

1 medical issues that have arisen and so forth, so -- and I
2 looked through all those excuses and excused them.

3 And then we got ten late yes's. That is they came in
4 late and they're a "yes." So you do the math, that's up to
5 433. We still have five people that haven't responded of those
6 433? Still five; is that right.

7 THE JURY CLERK: Yes.

8 THE COURT: So we just don't know what that means. I
9 mean maybe they moved, maybe, you know, they're in the
10 hospital, we don't know. So that's the rough number where we
11 are, okay. The 420 to 430 number is hopefully what will show
12 up on the 13th. I don't know how many of those will be no
13 shows. Presumably less than normal because they've already
14 been -- you know, said they would be available for that date.

15 The only change I'm going to make to the jury
16 questionnaire, I looked at this, and it's very minor, very,
17 very minor, but I wanted to let you know, it's the last
18 question. I believe it's the last question. No, next to last.
19 30, the question now reads: Do you know of any reason
20 whatsoever you cannot sit as a fair and impartial juror in this
21 case? I'm going to say "other reason" because we've already
22 sort of covered a number of matters and I want them to
23 understand they can talk about something else that they may
24 believe disqualifies them. So I'm just going to add that word,
25 "other." I assume there's no objection to that.

1 MR. BARBEE: No objection.

2 MS. KAGIWADA: No objection.

3 MR. HIRONAKA: No, Your Honor.

4 MR. ISAACSON: No, Your Honor.

5 MR. McDONALD: No.

6 THE COURT: All right.

7 MR. McDONALD: No objection, Your Honor.

8 THE COURT: All right. Now, today the witness list is
9 to be submitted. Is that on its way in or has it been
10 submitted?

11 MR. McDONALD: Yes, Your Honor, the United States is
12 in the process of alphabetizing and consolidating the list from
13 the defense. We are awaiting the final list from the defense.
14 I think were set, but we are awaiting. And we received an
15 e-mail early this morning from -- or late last night from one
16 defense attorney asking us to hold off sending that to the
17 Court. And so we are awaiting that final list from them.

18 THE COURT: All right. I thought they were supposed
19 to give it to you by May 1st. Wasn't that --

20 MR. McDONALD: They -- they --

21 THE COURT: Isn't that what I ordered?

22 MS. KAGIWADA: And I did provide a compiled list of
23 all defense attorneys' witness lists to the government on
24 May 1st.

25 THE COURT: So what are we waiting for? I'm confused.

1 MR. ISAACSON: I'm sorry, Judge. That's me. There
2 was a question I had. I think it's been resolved now. I'm
3 sorry. Sorry I didn't e-mail. There was a question that we
4 had. But we're good now.

5 THE COURT: Okay. But it doesn't sound like the
6 government's good because they said they're waiting, so...

7 MR. ISAACSON: I'm sorry. It was my fault for not
8 clarifying, Judge. There was an issue that came up last night
9 that I thought needed to be addressed. It has been addressed.
10 And I apologize to the government for not letting them know
11 early this morning it has been addressed. So...

12 THE COURT: Okay. So I don't know if they still know,
13 though, what that means because I don't know what it means. Is
14 the list that Ms. Kagiwada provided on May 1st, is that the
15 final list and they're good to use that list?

16 MR. ISAACSON: Yes. There have been some redactions
17 from that list, but --

18 THE COURT: I see.

19 MR. ISAACSON: So that was -- there were some
20 questions and that's been resolved.

21 THE COURT: I see. So there was a list provided and
22 then some people said let's take a few people off the list, and
23 that's what happened in the last few days. That's fair enough.

24 But the government should have everything now. They
25 don't need to hear from you further then, is what --

1 MR. ISAACSON: That's correct. And I'm apologizing to
2 them for not getting back to them earlier --

3 THE COURT: All right. All right. So, Mr. McDonald,
4 if you can just make sure you get that over to me then and
5 we'll incorporate that into the questionnaire. And the plan is
6 to be done with that questionnaire, you know, by Tuesday is my
7 goal to have everything done and then -- and then we can get
8 copies made and so forth. So I think we're fine -- we're fine
9 as far as the timing on that goes.

10 MR. McDONALD: Could I just ask one question about the
11 witness list? Would you prefer that we file that? Because the
12 list that we've compiled includes the hometown and occupation
13 of these witnesses. And so the question is, do we provide that
14 directly to the Court and possibly file a different witness
15 list that does not include that further identifying
16 information, it just includes the bare, you know, names of the
17 witnesses? But what we have otherwise endeavored to do is
18 create a list that has their names, their occupation and their
19 hometown for purposes of helping potential jurors, you know,
20 know whether they know these people. And then one further
21 point on that is, that's one thing that we have not fully
22 received from the defense is the occupations and hometowns of a
23 good number of the witnesses that they had put on their list.

24 THE COURT: Well, I think I made myself as clear as I
25 could that I wanted that information on there. And so why is

1 it not included?

2 No one has an answer.

3 MR. ISAACSON: Well, Your Honor, if I -- if I may, for
4 the witnesses I've had, I've identified them all on Oahu,
5 Honolulu. I mean that's --

6 THE COURT: All right. By 5 o'clock today I want you
7 to e-mail every witness that's yours on that list occupation
8 and, again, whether it be Honolulu, Oahu, just a general
9 location. Okay?

10 MS. KAGIWADA: Your Honor.

11 THE COURT: Yes.

12 MS. KAGIWADA: I did identify for my witnesses, a lot
13 of them are HPD officers. I didn't also identify a hometown
14 because if they're HPD officers --

15 THE COURT: Well, I think, you know, we might as well
16 fill in every category, but they can just put in Honolulu.

17 MS. KAGIWADA: Okay.

18 THE COURT: The government can do that because -- and
19 they'll know where that person is from.

20 MS. KAGIWADA: And some people we don't necessarily
21 know their occupations.

22 THE COURT: Okay. If you don't know, leave it blank.
23 But if you know where they're from, put it in. Okay. And I
24 think that can be publicly filed. If they testify, that
25 information is going to be public.

1 So, Mr. McDonald, you can send it to the orders inbox,
2 also file it. Okay?

3 MR. McDONALD: We will, Your Honor.

4 THE COURT: And if you can't get that until Monday
5 morning, that's fine, given it may take you a little longer.
6 So, you know, if you can get it in by Monday at noon, we can
7 still work through that. All right, Mr. McDonald?

8 MR. MCDONALD: Okay. Thank you, Your Honor.

9 THE COURT: All right. I think what we have set up is
10 on the 13th, I don't know if Ms. Abernathy has talked to you,
11 but I think she has a place where you folks can park and where
12 you can be with your clients. We sort of have some space
13 between you and the government to sort of wait. I told her I
14 don't think you folks want to be sitting there while jurors
15 walk in. It's just uncomfortable to be in that position. So
16 we'll keep you sort of backstage, if you will, away. I'm not
17 sure exactly the setup. And then once everyone is there you
18 will be brought in, sit down, and then I'll come out after
19 that. Okay?

20 And I do plan to stay while they're filling out those
21 questionnaires in case something comes up, and I think you
22 folks should as well plan to stay. Okay?

23 MR. BARBEE: Is the Court thinking 9 a.m. for us to
24 arrive with our clients and then what would be our expected
25 departure time?

1 THE COURT: Well, I don't know how long it will take.
2 I mean what did we say when we tested how long it would take?
3 What did I say, about 45 minutes, something like that. So I
4 think maybe an hour-and-a-half would be -- after they get the
5 questionnaire is my guess. I really don't think we'll start
6 right at 9 o'clock though, Mr. Barbee, with all of the check-in
7 and -- we're going to have a lot of court personnel there to
8 get people signed in, you know, get the materials, to sort of
9 keep an eye on people, to make sure people are getting seated
10 and so forth, and that everyone is seated then before you folks
11 come out and then when I come out. So we're going to have a
12 number of people there to make sure it goes as smoothly as
13 possible.

14 MR. BERVAR: Just to get --

15 THE COURT: Use the microphone so the government --

16 MR. BERVAR: Monday is the day for just the jurors to
17 fill out the questionnaires, we're anticipating maybe a
18 half-day?

19 THE COURT: Yes. Exactly. That's fair.

20 MR. BERVAR: Okay. And then my schedule or I had
21 written down that Tuesday we had -- there was no trial on
22 Tuesday?

23 THE COURT: Right. So if you remember, Mr. Bervar, I
24 spread this out more from when the last trial was scheduled so
25 that people would have more time with the questionnaires.

1 MR. BERVAR: Okay.

2 THE COURT: So Tuesday is the day where everyone
3 should be looking through those questionnaires. You folks
4 then, the defense and government have to get together though,
5 right? This isn't just -- we're not going to get back together
6 with you saying individually I'm good with juror number two
7 going; I'm not good with juror number two. I told you I'm not
8 going to rule like that because we'll never get through it if
9 we do that. So we're going to excuse people that everyone
10 agrees to excuse. Okay.

11 But I think what the defense should do is get together
12 first. That's my recommendation is the five of you get
13 together, agree, and you and the government can share a list
14 and see where it matches up or it doesn't match up and you can
15 have discussion to see if you can agree. Okay?

16 MS. KAGIWADA: And is the Court anticipating that we
17 would provide the Court with a combined list then at some
18 point?

19 THE COURT: Yeah, I mean then I think we're going to
20 get back together. You can do that. I mean I also have to
21 agree, right? So I want to look. But in the first instance,
22 you know, I'll take your lead. In other words, I'll look at
23 what your agreed upon list is and I'll take a look at that.
24 But I'll look through all the questionnaires as well so I have
25 a sense of what the answers are. Okay. Then if I have some

1 that I think should be excused, I may raise that, I may not.
2 It just depends on -- and see if everyone else agrees. Okay?

3 MR. BARBEE: Did you want that combined agreed upon
4 dismissal for cause or proposed dismissal for cause Tuesday
5 afternoon or Wednesday morning?

6 THE COURT: So when does the first group come in,
7 Cynthia?

8 THE JURY CLERK: May 17th, Friday. May 17th, Friday.

9 THE COURT: Right. So we don't come in until the
10 17th, Mr. Barbee. So I think what I wanted was by the 15th end
11 of day to have this done. So, what I suggest is we get
12 together at 1:30 on the 15th.

13 MR. BERVAR: Aren't we in court all day that day? I'm
14 sorry. I thought we were in court all day on the 15th?

15 MR. HIRONAKA: I don't think we ever said.

16 THE COURT: You may have just noted that, Mr. Bervar,
17 to keep yourself free. I think that's the day we were planning
18 to get together to go over this. I'm saying I think we can
19 start at 1:30.

20 MR. BERVAR: Okay.

21 THE COURT: To give yourself more time in the morning.
22 I don't think it will take more than an hour or two once you
23 folks do all your legwork.

24 Does that work for you then, Cynthia? No? You don't
25 look happy with that.

1 THE JURY CLERK: That's fine. That will give us a
2 day.

3 THE COURT: Well, it will be a day-and-a-half. We'll
4 be done, we'll know the first grouping relatively early, like
5 by 2:30 at the latest. And you'll know that so you can get to
6 work, especially for the neighbor island people that might be
7 on that list, right, Wednesday afternoon and then Thursday.

8 THE JURY CLERK: That's enough.

9 MR. HIRONAKA: And, Your Honor, just so I'm clear, the
10 433 that are returning on Monday the 13th, that is going to
11 be -- their numbers are going to be randomly assigned?

12 THE COURT: They're already randomly assigned.

13 MR. HIRONAKA: Oh, okay. So they're not going to be
14 again randomly -- they already have their numbers? The one
15 through 1500 was already randomly assigned?

16 THE COURT: Right. I mean we have assigned them, as I
17 understand it -- Cynthia, tell me if I'm wrong -- the random
18 system we already have, they sort of are assigned in certain
19 order. Not alphabetical.

20 MR. HIRONAKA: Right.

21 THE COURT: Just a random order. It will keep that
22 order for the one through 425 let's say that we have. And then
23 we're going to go through that process. And then once we have
24 the number we need for exercise of peremptories, we're going to
25 randomize again.

1 MR. HIRONAKA: Oh, we're going to randomize again at
2 that point?

3 THE COURT: Yes.

4 MR. HIRONAKA: Okay. And then that will be
5 essentially the order that they would be brought into the 50 or
6 whatever we need to get our full jury.

7 THE COURT: Exactly.

8 MR. HIRONAKA: Okay. Okay. So there will be no wheel
9 involved in this process.

10 THE COURT: Well, there will be a wheel, the old
11 fashioned lottery type wheel, right, where whatever number we
12 have that we're going to bring in to exercise peremptories on,
13 all of those names will go in there and they will be pulled
14 out. And regardless what number they had before they will be
15 given a new number, one through whatever it is. So it will be
16 randomized again. Does everyone understand that?

17 MR. HIRONAKA: So be double randomized and put into
18 the wheel.

19 THE COURT: I don't know about double randomized.

20 MR. HIRONAKA: I mean already randomly assigned one
21 through --

22 THE COURT: Right. It's not alphabetical right now.

23 MR. HIRONAKA: Right.

24 THE COURT: It's a random assignment.

25 MR. HIRONAKA: Right. And then we whittle it down

1 after Wednesday, it'll be reassigned numbers randomly.

2 THE COURT: No, no, no, no.

3 MR. HIRONAKA: Oh.

4 THE COURT: No. What we'll just do is exclude people.
5 So let's say one through ten. Right. Let's say we get rid of
6 one, two and three, everyone else is good. Then the people
7 that come in the first day, it will be four, five, six, seven,
8 eight, nine, ten, et cetera. Those numbers won't change.

9 MR. HIRONAKA: Okay.

10 THE COURT: Okay. But once we pick the number out of
11 all of those jurors that we need for the jury plus the
12 peremptories, those people are going to come back, whatever
13 number that is.

14 MR. HIRONAKA: Right.

15 THE COURT: The 12 plus six plus ten. If we end up
16 with a few extra I said I may allow extra peremptories, right?

17 MR. HIRONAKA: Right.

18 THE COURT: So whatever that number is. We'd bring
19 them in, they'll be randomized at that point in time.

20 MR. HIRONAKA: I see.

21 THE COURT: Or re-randomized at that point in time.

22 MR. HIRONAKA: Okay.

23 THE COURT: Okay? Everyone understand that? We sort
24 of covered this before. I know it's a little confusing.

25 Cynthia, is that correct as far as your understanding?

1 THE JURY CLERK: Yes.

2 MR. BARBEE: Judge, just one last thing again. So you
3 want the combined list that the government and defense agree
4 may be challenged for cause by Tuesday afternoon or Wednesday?

5 THE COURT: No, I think -- I think if you give it to
6 me Wednesday.

7 MR. BARBEE: Okay. Before the 1:30.

8 THE COURT: Even 10 o'clock.

9 MR. BARBEE: Wednesday, 10 o'clock.

10 THE COURT: Yeah, would be good. And then I have a
11 few hours to get organized at that point in time.

12 MS. KAGIWADA: And will it be the government or the
13 defense that will be providing you with that combined list?

14 THE COURT: Mr. McDonald, you can do that?

15 MR. McDONALD: Yes, we can, Your Honor.

16 THE COURT: I assume that wasn't really a question,
17 but a request the government had to do it, Ms. Kagiwada. You
18 provided the witness --

19 MS. KAGIWADA: I just leave it to the Court's
20 discretion.

21 THE COURT: Okay. Is that sort of clear then where we
22 are? And then Friday the 17th is the first day we're going to
23 bring in 45, right?

24 MS. KAGIWADA: Right.

25 MR. BARBEE: Right.

1 THE COURT: And to be clear, that will be number one
2 through whatever that number is of that first 45. Right? It's
3 not going to be one through 45 because we will have excluded
4 some of them. So it might be one through 60 for instance. But
5 it'll be 45 individuals. Right?

6 MR. BERVAR: That's the first day we'll be in court
7 with all the jurors here.

8 THE COURT: Correct.

9 MR. BERVAR: -- voir dire.

10 THE COURT: Right. And again, I'm going to do some
11 basic voir dire of the group and then they're going to be taken
12 into the courtroom next door and brought in one at a time for
13 individual voir dire.

14 MR. BERVAR: Thursday the 16th is nothing then.

15 THE COURT: Right, because that's the day we need to
16 get them here.

17 MR. BERVAR: Okay.

18 THE COURT: Right? We can't just decide they're here
19 and they show up. It doesn't work like that.

20 MR. HIRONAKA: And what period time block -- what
21 amount time blocks are we bringing in 45 people, Your Honor?
22 Is that every two hours or three?

23 MR. BERVAR: It's going to be all day voir dire.

24 THE COURT: All day.

25 MR. HIRONAKA: Oh, that 45 is expected to take all

1 day?

2 THE COURT: Yes. Yes. Because we're doing individual
3 voir dire.

4 MR. HIRONAKA: I see.

5 THE COURT: Right? So remember, I just want to remind
6 everybody now, the system we agreed upon is I'll do individual
7 voir dire. If there's reasons to let people go, we'll let them
8 go. We'll end up with however many we have left, they'll go
9 next door. Before they come in you folks will identify, very
10 quickly you're going to have to do this, move quickly, areas
11 you think I should be covering based on the questionnaire for
12 that particular juror. Okay. We're not going to waste time
13 where you're looking through the questionnaire right there.
14 Okay. You're going to have to highlight it, tab it, whatever,
15 but be ready.

16 And, you know, we'll know it by question number. You
17 can really just say question number, and point out, you know,
18 what the issue is. It's probably going to be publicity though,
19 right? It's going to be their knowledge of the case in most
20 instances. And then I'll bring them in and talk to them a
21 little bit more and see if they can -- I mean I don't think
22 we're going to get many people who don't know about the case.
23 This isn't going to be about finding jurors who know nothing.
24 It's going to be about finding jurors who can be fair and
25 impartial based on what they do know, seems to me is likely

1 where we end up with. Okay?

2 Any questions from you, Mr. McDonald?

3 MR. McDONALD: No, Your Honor.

4 THE COURT: Any on the defense side, any follow-up?
5 No?

6 MR. HIRONAKA: Your Honor, I don't know if this is a
7 good time to bring this up, but I did submit a letter to the
8 Court with respect to additional individual voir dire. So if
9 now is not a good time, that's fine, but I just -- it seems
10 like it might be a good time.

11 THE COURT: Well, I mean I've read it. I'm not going
12 to ask a lot of those questions. I will ask some of those
13 questions.

14 MR. HIRONAKA: Okay. The only thing that I had sort
15 of thought of after the fact, Your Honor, is that there's been
16 a lot of news articles including as recently as just the other
17 day with respect to sort of misconduct that's being alleged
18 against HPD officers. Not that it has anything to do with this
19 case, but the only other thing that popped in my head was
20 whether -- and then when I re-looked at our questionnaire for
21 the jurors to fill out individually, it didn't -- there was
22 generic questions that maybe could address those issues. They
23 might answer questions related to any preconceived notions they
24 have but --

25 THE COURT: You're worried about publicity about other

1 police officers as opposed to publicity in this case?

2 MR. HIRONAKA: Sort of the department in general,
3 yeah. And I didn't know if that was something we -- if it --
4 you know, it's sort of an area to me that maybe can go either
5 way. But it was just something that occurred to me because I
6 happened to be reading some recent articles.

7 THE COURT: Well, I will consider that, but I'm
8 unlikely to ask something specific to that.

9 MR. HIRONAKA: Okay.

10 THE COURT: Anything else on that then from anyone
11 else?

12 MS. KAGIWADA: I don't know if this is a good time,
13 but is there any idea as to what time the juror cards are going
14 to be available?

15 THE COURT: You're talking above my pay grade. Sorry.

16 THE JURY CLERK: Monday, hopefully by noon when I get
17 the final list.

18 THE COURT: So I think it's not -- that was Cynthia
19 Aranador, jury clerk, said Monday around noon-ish is the goal.
20 Right? All right.

21 MR. McDONALD: Your Honor, if I could ask a question
22 on that. Where will we retrieve those jury cards from on
23 Monday?

24 THE COURT: From you Cynthia?

25 Yeah, down on the first floor in the jury lounge.

1 MR. McDONALD: Okay.

2 THE COURT: She'll call. Cynthia will call you all.

3 MR. McDONALD: Okay. Thanks.

4 MR. HIRONAKA: Is there also a PDF version? I mean
5 not 1500 -- or 400 of them but maybe one PDF version?

6 THE COURT: One PDF version of what?

7 MR. HIRONAKA: Of the juror cards.

8 THE JURY CLERK: Actually, no, but --

9 THE COURT: The answer is "no" then. No "but." The
10 answer is no.

11 MR. HIRONAKA: That's fine.

12 THE COURT: We're not going to do extra work.

13 MR. HIRONAKA: I was not asking them to do extra --

14 THE COURT: They're down staff -- right, right. I
15 mean they're down on staff down there. This is a hardship
16 already.

17 MR. HIRONAKA: Oh, no, I understand.

18 THE COURT: So I'm not going to have them PDF
19 something they don't otherwise PDF.

20 And I know Ms. Abernathy wants to confirm with each
21 defense counsel where you want to pick up the questionnaires.
22 So make sure you talk to her before you go today, okay, to
23 confirm. I think she knows from last time, but she wanted to
24 confirm that.

25 I understand each of the defense counsel want one.

1 The government only wants one copy; is that right,
2 Mr. McDonald?

3 MR. McDONALD: Yes, that's right, Your Honor.

4 THE COURT: All right. I'm going to get two. One for
5 myself and one for a law clerk. And then we're going to have
6 an extra one because when the jurors come in we're going to
7 hand a copy to the jurors. So they have a copy of it when
8 they're in here for their individual voir dire. So that'll be
9 nine copies we'll make altogether. Okay? Plus the original
10 the court will keep obviously. Okay.

11 MR. McDONALD: Your Honor, my colleagues have
12 straightened me out and we would actually request two copies.

13 THE COURT: Two. Okay. I sort of suspected that
14 might be the case.

15 MR. McDONALD: Thank you, Your Honor.

16 THE COURT: All right. So that's ten total.

17 I wanted to talk, and I'll give you folks a chance to
18 raise anything you have, about the publication of exhibits
19 during trial and to make sure everyone understands they better
20 contact, you know, our IT department.

21 Ms. Kagiwada, I understand you wanted your paralegal
22 to be able to sit sort of over against the wall up here; is
23 that right?

24 MS. KAGIWADA: Yeah.

25 THE COURT: Which is fine. Each side I want to make

1 clear, you know, if the government is using exhibits on direct
2 and Mr. Barbee, you know, you're up on cross and you want to
3 reference that exhibit, all you have to do is ask the
4 government to put that exhibit up, and vice versa. Okay. So
5 you've got to cooperate with each other on your direct, cross,
6 redirect, and so forth, okay? In other words, I don't want to
7 waste time where you're asking the defense paralegal to pull up
8 the same document the government has and they just used and
9 presumably they can pull it up immediately. Okay?

10 I don't know, you know, on the rest of the defense
11 side, I mean I don't even have a problem if, you know, the
12 government used an exhibit that was introduced earlier and you
13 ask them to pull something up, you know, I don't see that as a
14 huge problem most likely. But, you know, make sure your
15 equipment works and is compatible with everything we have here,
16 Ms. Kagiwada. I don't know if you've had those discussions yet
17 with our IT staff.

18 MS. KAGIWADA: Actually we were here back in April.

19 THE COURT: Okay.

20 MS. KAGIWADA: But we never actually spoke to the IT
21 staff yet.

22 THE COURT: Okay.

23 MS. KAGIWADA: And I understand from your courtroom
24 manager that we've been told that we need to provide our own
25 cords, extension cords?

1 THE COURT: That may be. I'll tell you what, Renee,
2 why don't you hook them up with IT. I'm not sure who down
3 there would be the person. And give Ms. Kagiwada a name.

4 And you can call them, Ms. Kagiwada, come over, meet
5 them and see what it is. Okay.

6 MR. BARBEE: Yeah, we met with Ms. Honda and she
7 explained quite a bit to us about the monitors and things like
8 that.

9 THE COURT: All right. But I think for the pure IT
10 stuff, which she doesn't know, I don't know, you know, you need
11 to sit down with the IT people and make sure this is all going
12 to work. Again, I don't want to be here, you know, opening and
13 something doesn't work. So I want to make sure we're all set.

14 And the same with you, Mr. McDonald, okay?

15 MR. McDONALD: Understood, Your Honor.

16 THE COURT: And the U.S. Attorney's Office here sort
17 of has it down because they try cases all the time, but, you
18 know, I don't know if the systems you're bringing are different
19 in any way.

20 MR. McDONALD: We've done a preliminary review of the
21 systems and I think we're in good shape there, but we'll be
22 sure once first day comes we'll be ready.

23 THE COURT: All right. I know in your trial brief,
24 Mr. McDonald, you mentioned the using of exhibits during
25 opening. I don't know if, you know, any of you folks have

1 thought about using exhibits, but what you need to do is talk
2 to the other side and see if there's an agreement those
3 exhibits can be used during opening.

4 MR. BARBEE: Judge, Rus Barbee. I do have a problem.
5 It seems like the government wants to start its case in chief
6 in opening and they refer to it as opening argument in their
7 brief, and it's not an argument, it's a statement. And
8 typically the judge will tell the jury this is a roadmap of the
9 case, et cetera, et cetera. But to publish actual exhibits in
10 an opening, I've never had that experience in --

11 THE COURT: Well, I have. I mean a lot of trials it
12 happens, but it's usually really limited and it's something
13 everyone agrees will come into evidence.

14 MR. BARBEE: Okay.

15 THE COURT: Okay? So you folks can talk about that
16 and see. But you're right, I mean it's not going to be like,
17 you know, exhibit after exhibit after exhibit. It shouldn't
18 be. But if everyone is in agreement, that's fine. If not,
19 then we can take that up.

20 Are all defense counsel making an opening at the
21 beginning of the case?

22 MS. KAGIWADA: Yes.

23 MR. BARBEE: Yes.

24 MR. BERVAR: Yes.

25 MR. HIRONAKA: Yes.

1 MR. ISAACSON: I'm not sure, Judge.

2 THE COURT: Not sure yet? All right. Okay.

3 And I read in government's trial brief you folks are
4 talking about some stipulations, that just hasn't been
5 finalized yet; is that fair?

6 MR. McDONALD: That's correct, Your Honor. We have
7 sent around some stipulations. I think we're close on them,
8 which would forego the need to call probably between eight and
9 ten or so custodians. And I think we are close on that
10 stipulation.

11 MR. BARBEE: Yeah, and again, Rus Barbee here. I
12 don't think we're going to have too much of a problem so long
13 as it's mutual and the government agrees that our custodians
14 don't have to come in also.

15 THE COURT: Well, that's, you know, that old legal
16 principle what's good for the goose is good for the gander.
17 That seems fair, but I don't get involved in that. I just sort
18 of try to nudge is the best I can do I think towards -- that
19 you have the discussions at least. It's not up to me whether
20 you stipulate, but I do want you to discuss stipulations.

21 MS. KAGIWADA: Your Honor, is there a date by which
22 you would like stipulations?

23 THE COURT: What do you think is reasonable? I don't
24 want to -- a week-and-a-half?

25 MS. KAGIWADA: It's a little difficult to tell because

1 we're still working on our exhibits.

2 THE COURT: Okay.

3 MS. KAGIWADA: But whatever is convenient for the
4 Court.

5 THE COURT: I mean, look, because we're going to be
6 doing jury selection for a while, if we can say by the 15th,
7 I'm good with that to give you plenty of time.

8 MS. KAGIWADA: Okay. Thanks.

9 THE COURT: Okay? I mean it's kind of a -- I've
10 always felt it was sort of a phony date because I can set a
11 date, but you can stipulate after that. I'm not going to say
12 no, don't stipulate to something because you didn't meet that
13 deadline. So, all right.

14 MR. McDONALD: Your Honor, just one point here. And
15 we're certainly happy to discuss with counsel any stipulations
16 that -- we think that that makes sense to discuss that. Just
17 one note on that though, is that we still have not received
18 reciprocal discovery from any of the defendants other than
19 defendant Hahn. So we're not exactly sure what those
20 custodians are and maybe Mr. Barbee is referring to future
21 conversations about those custodians and we're very happy to
22 engage in that. But at this point we're just not sure exactly
23 what that is that they're referring to, but we're happy to have
24 those conversations down the line.

25 THE COURT: All right. And of course, everyone -- I

1 mean from my perspective the benefit of a stipulation is to
2 shorten the trial, right, for things that are unnecessary. So
3 clearly there can be a stipulation as to if the documents are
4 otherwise admissible, right? Not agreeing to whether it be
5 hearsay, not agreeing to whether or not it should be excluded
6 because it wasn't produced in discovery, whatever the matter
7 may be, that it's the authenticity is established.

8 And if it's a business record, then I suppose, you
9 know, the hearsay would come as well, right? But any other
10 objections you might have as to relevance or wasn't produced in
11 discovery, whatever you might have as far as other objections
12 can remain. So just consider that. Again, it's really not my
13 place to tell you what to do in that regard.

14 All right. So, Ms. Kagiwada, you had asked that we
15 have this in part to cover some matters that are typically
16 covered by the magistrate judge in a pretrial conference. I
17 got a list of things that we've covered. The only things we
18 didn't really cover were stipulations, which we just discussed.
19 Jencks disclosures. Are there ongoing Jencks disclosures or
20 more Jencks disclosures? Mr. McDonald, where does that stand?

21 MR. McDONALD: So, Your Honor, we have produced the
22 vast majority of anything that would qualify as Jencks. Now,
23 we are conducting even, you know, further interviews of
24 witnesses as we head towards trial. So, you know, as we
25 generate new material we're putting that out as quickly as

1 possible following, you know, witness prep interviews and that
2 sort of thing. But otherwise we have endeavored all along to
3 include Jencks statements in the discovery long before trial
4 and even going back to even the first round of discovery from
5 way back in November of 2017. But we are still, you know,
6 doing witness prep that's just leading up to trial and we do
7 expect to generate more material from that.

8 THE COURT: Other than ongoing witness prep, which
9 everyone understands if material is not in your possession yet,
10 you can't turn it over. But other than ongoing witness prep
11 where there may be a memorandum of interview created or
12 something, is there any historical Jencks that hasn't been
13 produced that you know of?

14 MR. McDONALD: I don't think so, Your Honor. I
15 think -- I think that we have covered that in prior
16 disclosures.

17 THE COURT: All right. And then Brady and Giglio, is
18 there any remaining Brady or Giglio?

19 MR. McDONALD: No, there's not. You know, we got a
20 letter from one defense counsel, I believe yesterday perhaps,
21 requesting, you know, whether we had obtained certain
22 information and whether we had deliberately not obtained it and
23 calling that Brady. And it's just our position that what we
24 did not receive from a witness, you know, could not possibly be
25 turned into a Brady issue. But otherwise the response to your

1 question is we have turned over anything that qualifies for
2 those categories.

3 THE COURT: All right. And if defense disagrees, that
4 can be brought to my attention obviously.

5 MS. KAGIWADA: Your Honor, I did want to bring up one
6 other point, which is we believe that several of the rounds of
7 discovery we're getting from the government now contain expert
8 witness testimony. And we would like to file a Motion in
9 Limine on that. Because we're getting very late notice
10 regarding experts.

11 THE COURT: Give me an example.

12 MS. KAGIWADA: Well, for example, they just identified
13 and generated information regarding a computer specialist who
14 is going to testify about Facebook and Facebook accounts and
15 how you can track them to various users. I don't quite
16 understand it myself.

17 THE COURT: Okay.

18 MS. KAGIWADA: But it seems -- and this was just
19 generated April 24th, 2019.

20 THE COURT: All right.

21 MS. KAGIWADA: That's one example. We're getting
22 several of these.

23 THE COURT: All right. Mr. McDonald?

24 MR. McDONALD: Your Honor, in an abundance of caution
25 we have been providing notice of witnesses that extend well

1 beyond any 702 requirements. The one witness that counsel has
2 just indicated, that is a witness to speak solely to cookie and
3 what cookie means in a Facebook return that counsel has had, I
4 don't have the date in front of me, but they've had that return
5 for over a year certainly and the printout is only probably,
6 you know, 19 pages or so from Facebook. It says that a user
7 used a cookie to access this computer. And so the -- the
8 testimony is, you know, what does cookie mean in this context,
9 and it means device. And that's -- that's all that that
10 testimony is.

11 You know, we don't -- we don't consider it as sort of,
12 you know, even expert opinion, but we in an abundance of
13 caution identified witnesses who, you know, could even arguably
14 be considered experts and we have endeavored to put out
15 resumes, you know, detailed descriptions of what they will
16 testify to. And so we don't believe that they're covered by
17 702. And even if they were, that, you know, we've done what we
18 need to do to give them sufficient notice of witnesses whose
19 testimony is very narrow and not scientific really in any way.

20 THE COURT: All right. Well, I'm not going to
21 obviously rule on it, but I will permit the Motion in Limine --
22 today is the 3rd -- by the -- can you do it by the 8th,
23 Ms. Kagiwada?

24 MS. KAGIWADA: Yes.

25 THE COURT: 8th. And then I'll give the government

1 till the 13th for any reply. And then sometime during that
2 week when we're not -- maybe on that Thursday we can get
3 together and have a discussion on that.

4 I'd like a joint motion though. I don't want separate
5 motions from the defense. So if you folks can get together on
6 that.

7 MS. KAGIWADA: Understood.

8 THE COURT: I don't know who this evidence pertains
9 to, right?

10 MS. KAGIWADA: It's mainly pertaining to my client.

11 THE COURT: Okay.

12 MS. KAGIWADA: So I imagine that I'll be taking the
13 lead on --

14 THE COURT: All right. But you can talk to others.
15 If they want to include it, you know, I'd prefer to have one
16 motion. I don't want a lot of different motions.

17 MS. KAGIWADA: Okay. Very good.

18 THE COURT: If we can do it that way. All right?

19 MR. BERVAR: Before we leave the Jencks issue, I know
20 the government says they've produced all the Jencks, you know,
21 pretrial prep. But normally we get an order that the Jencks is
22 to be produced the Friday before trial. Could we have that
23 order from the Court? All the Jencks should be --

24 THE COURT: There is no right to that order and
25 they've said they've produced it.

1 MR. BERVAR: Okay. Well --

2 THE COURT: So no.

3 MR. BERVAR: Okay.

4 THE COURT: I mean it's only ordered if the government
5 agrees to it. And they've said they've already produced it.
6 So makes no sense to order something they say they've already
7 produced. And I don't have the power to order them to produce
8 it.

9 MR. BERVAR: Okay. Very well.

10 THE COURT: As you well know. Okay. All right.

11 MR. BARBEE: Judge, Rus Barbee again. Item number six
12 on the pretrial checklist, I have sent an e-mail to the
13 government requesting a physical inspection of the evidence,
14 and I did get a reply. And I just want to confirm with the
15 government that they're going to schedule with us at a mutually
16 agreeable time to have a chance to inspect physical evidence.

17 MR. McDONALD: And I'll jump in here. Yes,
18 Mr. Barbee, as we wrote back in that e-mail, certainly, yes, we
19 will accommodate that the week of May 6th and we'll dial in on
20 the time and figure out a good time to do that with you.

21 MR. BARBEE: Thank you.

22 THE COURT: All right. So anything else you folks
23 want to cover at this point in time? Can start with
24 Ms. Kagiwada?

25 MS. KAGIWADA: No, I think that covers everything at

1 this time.

2 THE COURT: Mr. Barbee?

3 MR. BARBEE: No, Your Honor. Thank you.

4 THE COURT: Mr. Bervar?

5 MR. BERVAR: We're going to get instructions of where
6 to go specifically at the Blaisdell?

7 THE COURT: Talk to Ms. Abernathy after I leave the
8 bench.

9 MR. BERVAR: All right.

10 THE COURT: She may have left her May Day programs
11 early today to be here on time and she made it, because she was
12 off to her kids' school, but she's here.

13 MR. BERVAR: Okay.

14 THE COURT: And, yeah, she can help you as to where to
15 go.

16 MR. BERVAR: Okay.

17 THE COURT: Mr. Hironaka?

18 MR. HIRONAKA: No. Thank you, Your Honor.

19 THE COURT: Mr. Isaacson?

20 MR. ISAACSON: Nothing, Your Honor.

21 THE COURT: All right. Mr. McDonald, anything from
22 your end?

23 MR. McDONALD: Just one thing, Your Honor. We do have
24 the video deposition from the witness on Tuesday. And we
25 intend to lodge that with the Court just sort of per normal

1 procedures. I don't know if the Court had any other specific
2 method in which Your Honor wanted to receive that. Our intent
3 would be to just lodge a copy of that and the transcript with
4 the Clerk's Office.

5 THE COURT: I'm not sure you need to do that. I
6 suppose there is an issue, though, that as things stand now, is
7 the witness going to be able to appear to testify if nothing
8 changes by way of health?

9 MR. McDONALD: So if nothing -- if nothing changes
10 then our hope is that she is and she'll be able to testify.
11 She is hoping to receive a proceed -- a necessary medical
12 procedure related to her heart. I think we had talked about
13 that before. And that is something that she hopes to get
14 quickly. I don't know the exact timeline for that. So, but we
15 do -- we do hope that she is able to testify, but it's not
16 clear given her pending procedure.

17 THE COURT: All right. Because I mean if she can't,
18 then obviously objections are going to have to be filed by both
19 sides, right, as to where they made objections during the
20 course of the deposition that I would rule on and then you'd
21 need time for the videographer to do the splicing and so forth.
22 But I don't think it makes sense for us to do that work right
23 now given we sort of don't know that she won't be able to
24 testify.

25 If -- if things turn for the worse somehow,

1 Mr. McDonald, you should give notice and then I might, you
2 know, require you folks to provide -- to provide your
3 objections. Okay?

4 MR. McDONALD: Yes, Your Honor. We will certainly
5 keep close tabs on that situation and give an update at the
6 first possible opportunity on that. So we'll be endeavoring to
7 do that.

8 THE COURT: All right. Okay. Because that does take
9 some time. We do that in civil cases. It's not a quick
10 process necessarily to get through those objections and then
11 for whoever does the splicing, to get all that done.

12 MR. ISAACSON: Your Honor, I did have one more
13 question. I think that in this case I anticipate the
14 government providing video or audio testimony of certain
15 portions of my client's testimony before the grand jury and
16 possibly the Ethics Commission. We may have disagreement on
17 how much should be put in and not. How would you like us to
18 address those issues to you?

19 THE COURT: You know, I mean there could have been a
20 motion in limine, there wasn't, I suppose, but I understand
21 that's really hard to do by way of Motion in Limine. But, I
22 mean, do you know how much they're planning to put in at this
23 point in time?

24 MR. ISAACSON: I think we're going to have more
25 discussions.

1 THE COURT: Well, have more discussions and then we
2 can talk later.

3 MR. ISAACSON: Very well, Your Honor.

4 THE COURT: We'll get back together before then.

5 MR. ISAACSON: Yes, Your Honor.

6 THE COURT: Okay. But I'd prefer you sort of try to
7 nail that down as to where you stand. So they say they want
8 this, and you want something more, tell them that and see what
9 they say and try to reach an agreement before you come back to
10 me.

11 MR. ISAACSON: Yes, Your Honor.

12 THE COURT: Okay? But if you still can't, obviously
13 we need to work through that.

14 MR. ISAACSON: Yes, Your Honor.

15 THE COURT: Because the audio will be played. Right?
16 And it needs to be --

17 MR. ISAACSON: I anticipate that, Judge.

18 THE COURT: I need to rule so that they can get the
19 audio in order the right way.

20 MR. ISAACSON: Yes, Your Honor.

21 THE COURT: Right? Okay. All right. And so to be
22 clear on the four days we're going to be meeting with the 45
23 jurors each day, you know, once we reach a threshold of we have
24 enough, we're going to stop, right? We're not going to go for
25 the sake of to keep going. Right? And that would be at a

1 minimum the 12 plus the four alternates plus ten defense
2 peremptories, six government peremptories, two peremptories for
3 alternates on each side, right? So whatever that adds up to.
4 That would be the minimum.

5 If we get more than that, then we can talk about
6 adding peremptories. Okay. So, you know, I don't have a
7 problem with that if we can go a couple extra hours and get
8 some more people, that's fine. I'm happy to do that because I
9 know that's what you folks want is a few more peremptories.
10 Okay?

11 MR. McDONALD: Your Honor, in terms of the timing, in
12 the event that we end early, let's say that we have enough
13 jurors on, you know, Monday the 20th, let's say. Under those
14 circumstances will the plan be to start opening statements the
15 beginning of the next business day? Like, what -- you know, if
16 we have enough jurors on Monday, then we'll start first thing
17 Tuesday morning, or if we get enough jurors Tuesday, we'll
18 start first thing Wednesday morning. Will that be the plan?

19 THE COURT: Well, I think we may have told jurors we
20 wouldn't be in session the 21st and 22nd; is that right? We
21 didn't tell them that on that cover sheet about the ability to
22 serve?

23 CHIEF DEPUTY ABERNATHY: That was one of the days that
24 we were going to call in the 45. So they had to have been
25 available on those days.

1 THE COURT: Oh, that's right. So the 17th, 20, 21,
2 22. I see. Yeah, right. Right.

3 I mean I would prefer to keep moving and to move
4 forward if we can. So if we are done a day early, I'd prefer
5 to move up a day earlier.

6 MR. McDONALD: Yeah, that's our preference as well,
7 Your Honor.

8 (Pause in the proceedings.)

9 THE COURT: Mr. McDonald, the defense is huddling. So
10 I'm going to let them huddle for a minute.

11 MR. McDONALD: Understood. Thank you, Your Honor.

12 (Pause in the proceedings.)

13 MR. HIRONAKA: Your Honor, I'm sorry, the only thing I
14 was sort of -- we were conferring on is, if we did finish let's
15 say early on Monday and we hit a certain number --

16 THE COURT: I really don't think that will happen, but
17 okay, let's --

18 MR. HIRONAKA: In theory.

19 THE COURT: -- let's be really optimistic.

20 MR. HIRONAKA: The only thing that I was saying is
21 that, you know, because, you know, the defense is not
22 necessarily -- everything is, you know, all -- well, I think
23 what I'm saying is we would want at least overnight to confer
24 before we start exercising peremptory challenges. But I don't
25 think the process of peremptory challenges --

1 THE COURT: We have to because we wouldn't have all
2 the people from the day before there.

3 MR. HIRONAKA: Oh, that's right. Yeah.

4 THE COURT: Right? We'd have no choice. I mean we've
5 got to bring the people back sometime in the morning to
6 exercise peremptories.

7 MR. HIRONAKA: But was our plan to do sort of after
8 the peremptory challenges, which probably wouldn't take more
9 than an hour --

10 THE COURT: Right. Right.

11 MR. HIRONAKA: To then move straight into opening
12 statements?

13 THE COURT: Correct.

14 MR. HIRONAKA: Okay.

15 THE COURT: Right.

16 MR. HIRONAKA: All right. That's fine.

17 THE COURT: Right. But you all made it clear to me
18 you wanted those jurors here to exercise your peremptories.
19 You wanted to be able to see them. And I don't have a problem
20 with that. So that's why we said we're going to have to bring
21 them back altogether. So there's no way to exercise the
22 peremptories one day at a time or at the end of any particular
23 day.

24 MR. HIRONAKA: That's true. Yeah. Thank you.

25 THE COURT: Okay. I know this can get confusing, but

1 that's -- that's how that will work. Okay?

2 Mr. Weinberg will be here?

3 MR. BARBEE: No, he comes back -- he's on a trip with
4 his family. He comes back Tuesday.

5 THE COURT: No, no, I mean on -- during those days,
6 the four days.

7 MR. BARBEE: Oh, yeah.

8 MS. KAGIWADA: He will definitely be here for all of
9 voir dire.

10 MR. BARBEE: Yes, Your Honor.

11 THE COURT: Okay. All right. Well, I'm sure there's
12 more we'll have to talk about, but for today that does cover a
13 good amount. Okay. Thank you all.

14 (The proceedings concluded at 3:05 p.m., May 3, 2019.)

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COURT REPORTER'S CERTIFICATE

I, CYNTHIA FAZIO, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing pages is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, January 26, 2021.

/s/ Cynthia Fazio
CYNTHIA FAZIO, RMR, CRR, CRC